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Nos. 92-1384 and 92-1839

In the Supreme Court of the United States

OCTOBER TERM, 1993

BARCLAYS BANK, PLC, PETITIONER

v.

FRANCHISE TAX BOARD OF CALIFORNIA

COLGATE-PALMOLIVE COMPANY, PETITIONER

v.

FRANCHISE TAX BOARD OF CALIFORNIA

ON WRITS OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE THIRD APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether California's application of worldwide combined reporting (WWCR) to a foreign-controlled multinational corporation during tax year 1977 impaired the federal government's conduct of international commercial policy and therefore violated the Foreign Commerce Clause of the Constitution.

2. Whether California's application of WWCR to a domestic multinational corporation during tax years 1970-1973 violated the Foreign Commerce Clause.

3. Whether the Fourteenth Amendment to the Constitution requires California to provide a refund remedy in the event that the taxes at issue are determined to have been unlawfully imposed.

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INTEREST OF THE UNITED STATES

The Constitution confers upon Congress the power to "regulate Commerce with foreign Nations" (Art. I, § 8, Cl. 3) and authorizes the President, "by and with the Advice and Consent of the Senate, to make Treaties" (Art. II, § 2, Cl. 2). The United States has a substantial interest in cases that address the constitutional allocation of authority over matters affecting foreign commerce and foreign relations. These consolidated cases present such issues. At the Court's invitation, the United States filed

a brief amicus curiae in No. 92-1384 at the petition stage.

STATEMENT

Different methods have been used to identify and allocate among taxing jurisdictions the income received by multinational corporations. The method employed by the United States is known as the "separate accounting" or "arm's length" method. This method generally treats each corporation as a distinct tax unit, required to report income from its transactions with every other corporation (including its parent, subsidiaries or affiliates) on an arm's length basis. The separate accounting method of taxation is employed in the Internal Revenue Code and in the many bilateral tax treaties to which the United States is a party (92-1384 Pet. App. H43).[1] The separate accounting method is also employed by most other nations for both domestic and international purposes.

During the tax years at issue in these cases,[2] California employed a different method of allocating corporate income known as "worldwide combined reporting" (WWCR). Under the California tax provisions then in effect, the State generally treated parents, subsidiaries and affiliates engaged in a unitary business as a single entity for tax purposes, pooled their global income, and allocated a portion of that combined income to California based upon a multi-factor formula.[3] See *Container Corp.* v. *Franchise Tax Board,* 463 U.S. 159, 162-163 (1983).

[1] There are, of course, provisions of the Internal Revenue Code designed to forestall potential abuses of the separate accounting method. See, *e.g.*, 26 U.S.C. 482.

[2] No. 92-1384 involves tax year 1977. No. 92-1839 involves tax years 1970-1973.

[3] Under legislation enacted in 1986 (effective in 1988), California provided all corporations with a "water's edge" alternative to WWCR. See Cal. Rev. & Tax. Code § 25110 (West 1992); 92-1384 Pet. App. B4 n.2. In general, the "water's edge" method permits a taxpayer to report its income separately from the income of its foreign parents or affiliates. This case does not directly consider or address the "water's edge" method of taxation because it concerns tax years that preceded California's adoption of that method.

On September 10, 1993, California enacted legislation to remove the fee the State previously had imposed on corporations that elected "water's edge" treatment under the 1986 legislation and also to remove the regulatory authority under which respondent could disregard a "water's edge" election and require a corporation to report its income on a worldwide basis. See Cal. S.B. 671, §§ 16, 23, 24, 26 (1993). Under this new legislation, all corporations subject to tax in California may now freely elect taxation under the "water's edge" method.

Petitioners in these cases contend, *inter alia,* that the former California taxing scheme violated the Foreign Commerce Clause because it "impair[ed] federal uniformity in an area where federal uniformity [was] essential, and prevent[ed] the Federal Government from speaking with one voice in international trade." *Container Corp.,* 463 U.S. at 193 (citations and internal quotations omitted). Proper resolution of this claim, we believe, requires a thorough understanding of the development of the federal government's policy regarding the States' use of WWCR.

1. Significant controversy over the States' use of WWCR first arose during the late 1970's when the Senate debated the United States-United Kingdom Tax Convention. The treaty was initially signed on December 31, 1975. Convention for Avoidance of Double Taxation, December 31, 1975, United States-United Kingdom, 31 U.S.T. 5670, T.I.A.S. No. 9682. The chief concession made by the British government was to reduce significantly the discriminatory impact of U.K. tax provisions regarding dividends paid by U.K. corporations. This provision was given an effective date of January 1, 1975, and it was expected to result in very substantial tax refunds to U.S. investors.

Within the United States, controversy over the treaty centered chiefly on Article 9(4). 31 U.S.T. 5677. As originally drafted, this provision appeared to bar the States' application of WWCR even to U.S. corporate parents with U.K. subsidiaries or affiliates. Apparently

so broad a limitation had not been intended, and in response to the States' objections the U.S. and U.K. exchanged notes making clear that the States were barred from applying WWCR only in determining the tax liability of U.K.-controlled corporations. See *Tax Treaties with the United Kingdom, the Republic of Korea and the Republic of the Philippines: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 305-306 (*1977 Hearings*) (1977) (Treasury Department Memorandum). So modified, the treaty was transmitted to the Senate by President Ford on June 24, 1976. 122 Cong. Rec. 20,348 (1976).

Even after this revision, individuals both inside and outside the Senate continued to express a wide range of objections to Article 9(4). Restrictions on the States' use of WWCR were said to constitute an improper interference with state autonomy. See, *e.g.*, 124 Cong. Rec. 18,427 (1978) (Sen. Stevens). Other Senators took the less sweeping position that any federal limitations on the States' taxing powers should be effected by legislation rather than through an international agreement negotiated by the executive branch alone. See, *e.g.*, *id.* at 18,417 (Sen. Church); *id.* at 18,423 (Sen. Kennedy). Some participants, chiefly state taxing officials, argued that the arm's length method was unworkable and subject to manipulation by corporate taxpayers. See, *e.g.*, *ibid.*; *1977 Hearings* 69 (prepared statement of the National Association of Tax Administrators). Opponents of the provision warned that the treaty would establish a dangerous precedent, and that the States' freedom to apply WWCR to the corporations of other countries would quickly be negotiated away. Senator Church led the opposition in the Senate, offering a reservation that would render Article 9(4) inapplicable to political subdivisions. See 124 Cong. Rec. 18,416 (1978).

Those who opposed the Church reservation (and supported the treaty with Article 9(4) included) countered with a variety of arguments. Advocates of Article 9(4) relied in substantial part upon the contention that the

arm's length approach provided a superior method for distinguishing foreign from domestic income. In a letter to the head of the California Franchise Tax Board dated February 15, 1977,[4] Secretary of the Treasury Blumenthal stated that "[t]he unitary apportionment system is inconsistent with accepted tax treaty policy which prohibits one country from taxing the business profits of an enterprise of the other unless that enterprise is engaged in business through a permanent establishment in the first country." The letter explained that "[u]nder unitary apportionment, if the profit rate of a foreign member of a unitary group exceeds the profit rate of the member doing business in California, the effect is tantamount to taxing the profits of the foreign enterprise." Blumenthal went on to state that "it is our experience, as well as that of most other countries, that the determination of income on the basis of an arm's-length standard is not only more accurate but also far less arbitrary," and argued that California's use of an apportionment method different from "the internationally accepted approach" would often lead to double taxation. The Secretary also stated that "[t]he unitary system imposes a substantial compliance burden on multinational corporations" and that the government was "aware of cases where this burden has discouraged foreign investment in the United States." The letter concluded: "For all of these reasons, I repeat, the provisions of the proposed income tax treaty with the United Kingdom seem to me wholly appropriate and desirable."

Treasury officials also emphasized, however, that the provision's impact on the States should be small because the treaty applied only to U.K.-controlled corporate taxpayers, leaving the States free to employ WWCR in taxing the income of corporations controlled by the nationals of other foreign countries. Thus, Assistant Secretary of the Treasury Laurence N. Woodworth explained that un-

[4] Secretary Blumenthal's letter is reprinted in *1977 Hearings* 104-105.

der Article 9(4), "if the U.K. corporation is itself controlled by, say, a New York corporation, or by a Dutch corporation, California may take into account the income and expense of the entire group." *1977 Hearings* 35. Opponents of the Church reservation also emphasized the closely related argument that Article 9(4) should be viewed not in isolation, but as a necessary quid pro quo for substantial concessions made by the British. Secretary Blumenthal reminded the head of the California Franchise Tax Board that "a treaty is a negotiated document containing a number of concessions by both partners. In the pending treaty, the United Kingdom made very important concessions, particularly in the treatment of dividends paid to U.S. investors. We view the Article 9(4) provision as an appropriate quid-pro-quo for the concessions made by the United Kingdom." *1977 Hearings* 104. In a subsequent letter to state Governors dated April 28, 1978, the Secretary sounded a similar theme, stating: "I realize that the merits of the unitary method can be debated. My purpose in writing is not to enter that debate but simply to note that the treaty restriction on this method represents a narrowly drawn and relatively minor concession, by any measure, in relation to the overall balance of benefits in the treaty." Letter from the Secretary of the Treasury to State Governor 2 (Apr. 28, 1978). A Treasury Department memorandum, responding to objections to Article 9(4) raised in testimony before the Senate Foreign Relations Committee, contested the assertion that "every treaty country will obtain the same provisions as the United Kingdom." The memorandum responded that "renegotiation of our complete treaty network will not occur for several years; and the Treasury Department will agree to the provision only in the context of a treaty beneficial to the United States." *1977 Hearings* 305.[5]

[5] On the final day of floor debate, Senator Javits relied heavily on this rēpresentation, stating that "[i]f the treaty is approved, Treasury will consider the inclusion of similar provisions in other treaties, but only in return for commensurate concessions on the other side." 124 Cong. Rec. 18,657 (1978). Senator Javits had previously characterized Article 9(4) as "but a part of a larger whole which is of great interest and of great importance to the United States," and as "a concession which we have made to the United Kingdom." 124 Cong. 18,418 (1978). Other Senators expressed similar views, opposing the Church reservation on the ground that the treaty *as a whole* would benefit the United States, and that acceptance of the Church reservation would imperil British acceptance of the accord. See *id.* at 18,652-18,653 (Sen. Hayakawa); *id.* at 18,669 (Sen. Dole).

On June 23, 1978, the Senate voted 44-34 to reject the Church reservation. 124 Cong. Rec. 18,670. The subsequent vote on the treaty itself was 49-32 in favor, *ibid.*—five votes less than the two-thirds required by the Constitution. On June 27, 1978, the treaty was approved by the Senate subject to the Church reservation. *Id.* at 19,076. U.S. and U.K. negotiators ultimately agreed upon a third protocol to the treaty, which incorporated the Church reservation on a bilateral basis and included concessions to the British on offshore drilling profits and the insurance premiums excise tax. That protocol was approved by the Senate by a vote of 98-0 (125 Cong. Rec. 17,433 (1979)) and soon thereafter was approved by the House of Commons.

The Carter Administration addressed the WWCR issue on at least one additional occasion. On March 31, 1980, Assistant Secretary of the Treasury for Tax Policy Donald C. Lubick presented before the House Ways and Means Committee the Treasury Department's views on H.R. 5076 (96th Cong., 2d Sess. (1980)), a bill that would have essentially barred the States' use of WWCR. The Assistant Secretary's statement noted that "[a]lthough the bill makes no distinction between corporate groups under United States control and those under foreign control, such a distinction may be warranted." 92-1384 J.A. 588. He explained, in particular, that "the application of a unitary system to U.S. controlled corporate groups represents much less of an international irritant, if in fact that problem is present at all." *Id.* at 589. The statement con-

cluded that "[t]he Treasury Department supports the goals of [this provision] of the bill, with respect to affiliated groups controlled by foreign persons. We do not oppose the provisions of [this part] of the bill insofar as U.S. controlled corporate groups are concerned." *Ibid.*

2. The brief amicus curiae filed by the United States in *Chicago Bridge & Iron Company* v. *Caterpillar Tractor Co.*, No. 81-349, in January 1982 was in two respects a departure from prior executive branch practice. For the first time the government's criticisms of the worldwide method were couched in constitutional terms. Second, the government's opposition to the States' use of WWCR was extended to cover the method's application to domestic corporations with foreign subsidiaries.[6] The government argued, *inter alia*, that the Illinois taxing scheme was invalid because the "unitary method impairs the otherwise uniform international custom that is the basis of the treaties between the United States and numerous foreign countries that are intended to prevent international double taxation of income." Br. 16. The brief noted that several foreign governments had protested the States' continued use of WWCR. *Ibid.* The brief did not, however, cite any statement by an executive branch official setting forth the position of the federal government regarding the States' use of WWCR.

Chicago Bridge & Iron was held over to the following Term, and the Court granted certiorari in *Container Corp.* The United States did not submit a brief in *Container Corp.*, and this Court upheld the use of WWCR as applied to a domestic corporation with foreign subsidiaries. The Court distinguished its prior decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434

[6] The brief acknowledged, however, that application of WWCR to foreign-controlled corporations raised even greater concerns; accordingly, the brief cautioned that "the Court should not decide this case on any ground that would foreclose any claims that may be raised in a future case involving the imposition of the combined reporting method to a group of corporations with a foreign parent." 81-349 Amicus Br. at 19.

(1979), by noting, *inter alia*, that "in this case, unlike *Japan Line*, the Executive Branch has decided not to file an *amicus curiae* brief in opposition to the state tax." 463 U.S. at 195. It acknowledged the government's filing in *Chicago Bridge & Iron*, but asserted that "there has been no indication that the position taken by the Government in *Chicago Bridge & Iron Co.* still represents its views, or that we should regard the brief in that case as applying to this case." *Id.* at 195 n.33. The dissent took issue with this statement, arguing that there was "no reason to ignore [the Government's] view in one case currently pending before the Court when considering another case that raises exactly the same issue," and noting that "[t]he Solicitor General has not withdrawn his memorandum, nor has he supplemented it with anything taking a contrary position." *Id.* at 204 (Powell, J., dissenting).

This Court's decision in *Container Corp.* was issued on June 27, 1983.[7] In the wake of that decision, President Reagan established the Worldwide Unitary Taxation Working Group, a diverse group of federal and state officials and representatives of the business community. That group was "charged with producing recommendations . . . that will be conducive to harmonious international economic relations, while also respecting the fiscal rights and privileges of the individual states." Chairman's Report on the Worldwide Unitary Taxation Working Group at 3 (1984). The Group considered comments from a wide spectrum of interested parties, including foreign governments and foreign taxpayers.

On July 31, 1984, Secretary of the Treasury Regan, as chairman of the Worldwide Unitary Taxation Working Group, transmitted his report to the President. Members of the Working Group agree on three principles that should guide state taxation of multinationals' income: (1) a water's edge limitation on the States' application of

[7] Nine days later the Court dismissed the appeal in *Chicago Bridge & Iron* for want of a substantial federal question. *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co.*, 463 U.S. 1220 (1983).

formula apportionment to both foreign and domestic corporations; (2) federal administrative assistance to the States in their application of the arm's length method; and (3) "[c]ompetitive balance for U.S. multinationals, foreign multinationals, and purely domestic businesses." Chairman's Report at ii.

The report did not propose immediate federal action to implement these principles. Rather, Secretary Regan's cover letter noted that "[i]f states enact legislation based on the three principles agreed upon by the Working Group, the United States will be able to speak with one voice in dealing with its foreign trading partners, and this irritant to international commercial relations will have been eliminated." Chairman's Report at iii. Secretary Regan recommended that the administration should support federal legislation only if the States failed to make appreciable progress in implementing the Group's recommendations within a suitable interval. *Ibid.*

3. Subsequent progress at the state level proved inadequate, however, and on November 8, 1985, President Reagan issued a statement calling for federal legislation to impose a water's edge standard on state taxation of multinationals. 92-1839 J.A. 7. The President stated that "[s]ince states have not universally accepted these principles, I am instructing the Secretary of the Treasury to initiate the process of crafting Federal legislation to incorporate these principles into law." *Ibid.* The President's statement also noted that "[f]urther, I am instructing the Attorney General to ensure that the United States' interests are represented in appropriate controversies and cases consistent with this approach." *Id.* at 8.

On December 18, 1985, the Treasury Department proposed legislation that would prohibit the States' use of WWCR and provide the States with federal assistance in their application of the arm's length method. That legislative proposal was introduced in the Senate as S. 1974 (99th Cong., 1st Sess. (1985)), and in the House as H.R. 3980 (99th Cong., 1st Sess. (1985)). In a letter addressed to the Speaker of the House and President of the Senate, Secretary of the Treasury Baker explained that "[t]he practice of a small but important minority of the states of assessing corporate income tax on a worldwide unitary basis has caused serious difficulties with the conduct by the federal government of our foreign economic policy." Letter from the Secretary of the Treasury to the President of the Senate 1 (Dec. 18, 1985) (hereafter "Baker letter"). The Secretary noted that this country's trading partners had raised numerous objections to the worldwide method and stated, "We agree with these contentions." *Ibid.* The Secretary further observed that continued use of WWCR at the state level had resulted in the adoption (though not yet in the implementation) of retaliatory legislation by the U.K., and he asserted that "[i]t has become clear that the ability of the federal government to speak with one voice in the conduct of foreign economic affairs is significantly weakened because of these state tax practices." *Ibid.*

The Secretary acknowledged that significant progress had been made after dissemination of the Working Group's recommendations, but he concluded that "[t]he failure to date to achieve voluntary compliance by all states with the principles adopted by the Working Group, and the increasing international difficulties caused by continued adherence by a few states to the worldwide unitary method, have led the Administration to conclude that restrictive legislation should now be adopted." Baker letter at 2. The Secretary also noted that the administration bill would bar the use of WWCR as to both foreign and domestic corporations. He acknowledged that "the principal foreign commerce issues raised by state worldwide unitary taxation would be resolved if states were to agree that they would not impose worldwide unitary tax on foreign controlled entities." *Ibid.* The Secretary asserted, however, that such an approach would cause other serious problems by effecting a form of discrimination between domestic and foreign businesses (in favor of the latter). *Ibid.* The Secretary also emphasized that the legislation

provided for federal assistance in the States' administration of the arm's length method. *Id.* at 2-3.

On January 30, 1986, Secretary of State Shultz wrote to the governors of the States that continued to employ WWCR. The letter stated: "I am writing to explain to you the foreign policy concerns that prompted this legislation and to urge you to act promptly to reconsider your state's use of the worldwide unitary method of taxation." 92-1384 J.A. 601. The letter noted that the States' use of WWCR had prompted diplomatic complaints from numerous countries and retaliatory legislation from the U.K., and concluded: "For these reasons I believe state worldwide unitary taxation to be inappropriate. Continued state taxation on a worldwide unitary basis will greatly impair the ability of the federal government to carry out its tax and investment policy in the international arena and to manage the sensitive issue of international double taxation." *Id.* at 602-603.

On March 7, 1986, the United States filed a brief amicus curiae in *Alcan Aluminum Ltd.* v. *Franchise Tax Board*, No. 84-C-6932 (N.D. Ill.), a suit seeking injunctive relief against California's application of WWCR to foreign corporations. The government's brief argued that the California tax violated the Foreign Commerce Clause. The Shultz letter was attached as an exhibit in support of the contention that the California law had adversely affected the nation's foreign policy.[8]

On September 29, 1986, J. Roger Mentz, Assistant Secretary of the Treasury for Tax Policy, testified before a Senate subcommittee regarding the pending legislative proposal. Assistant Secretary Mentz asserted that significant progress had been made in inducing States to abandon WWCR without the passage of federal legislation, and that "the most significant progress is California." S. Hrg. 1066, 99th Cong., 2d Sess. 63 (Sept. 29, 1986). (California had amended its tax statute on September 5, 1986, to provide for a water's edge election, albeit an election contingent upon the payment of a significant fee. See note 3, *supra*.) The Assistant Secretary acknowledged that "California's legislation also has some elements in it that are inconsistent with the President's statement, and with S. 1974," but concluded, "since there has been such significant progress, that restrictive Federal legislation is not warranted at this time." *Ibid.* Instead, the Assistant Secretary recommended that "congressional action on S. 1974 should be deferred until the remaining worldwide unitary states have a full opportunity to act, California has an opportunity to consider and respond to comments on its recently enacted legislation, and we have an opportunity to evaluate the actual operation of water's edge legislation passed by the several states when fully in effect." *Id.* at 71-72 (92-1384 J.A. 441).

4. The federal government continued its involvement, however, in litigation challenging the constitutionality of the former California taxing scheme. On September 17, 1986, the United States filed a brief amicus curiae in the California Superior Court supporting Barclays Bank in the instant suit for refund of taxes paid in tax year 1977. In support of its claim that California's use of WWCR had undermined the federal government's conduct of foreign economic policy, the brief cited (1) the Shultz letter of January 30, 1986, (2) the retaliatory legislation enacted by the U.K. in the summer of 1985, and (3) protests received from other trading partners. The government maintained its support for Barclays throughout the state-court litigation.[9] The United States has not, how-

[8] The complaint in *Alcan* was dismissed on jurisdictional grounds. The United States did not participate in the case in either the court of appeals or this Court, in which the only issue was federal jurisdiction. This Court ultimately held that Alcan's suit was barred by the Tax Injunction Act, 28 U.S.C. 1341. See *Franchise Tax Board* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 338-341 (1990).

[9] At an earlier stage of this case, the United States expressed in this Court the view that California's application of WWCR to foreign-controlled corporate multinationals violated the Commerce Clause. 92-212 U.S. Amicus Br. at 12-13.

ever, participated as amicus curiae at any stage of Colgate's lawsuit.

SUMMARY OF ARGUMENT

1. A state taxing scheme may not constitutionally be applied to foreign commerce if it will "impair federal uniformity in an area where federal uniformity is essential, and prevent[] the Federal Government from speaking with one voice in international trade. *Container Corp.*, 463 U.S. at 193 (citation and internal quotations omitted). In applying this test to concrete cases, the question is whether the state action at issue is incompatible with federal policy as adopted and explicated by officials of the executive and legislative branches. In undertaking this inquiry, moreover, the court must look to federal policies in effect at the time the tax was levied, lest States unjustly be held liable for refunds of taxes that violated no federal policy, and were thus in no way unlawful, at the time the disputed tax liability was incurred.

2. Judged against this standard, Barclays' claim must fail. As of 1977 (the tax year in question) executive branch officials had expressed a preference for the arm's length method and had negotiated a treaty prohibiting application of WWCR to U.K.-controlled corporate taxpayers. These officials had not, however, indicated that further use by the States of WWCR would be incompatible with a standard to which the United States was committed by general agreement with its trading partners. To the contrary, executive branch officials during the treaty debate gave assurances that in the event of the treaty's approval by the Senate, States could continue to apply WWCR to corporations controlled by other (*i.e.*, non-U.K.) foreign nationals, and that their right to do so would not be bargained away except in return for concessions from our trading partners. Against this backdrop, the executive branch's negotiation of the treaty and

efforts to effect its approval by the Senate cannot accurately be viewed as manifesting a then-existing federal policy requiring uniformity among the States.

3. Colgate-Palmolive Company, a domestic corporation, seeks refunds of taxes paid from the years 1970-1973. That claim should be denied. During the years in question, no federal policy precluded the States' application of WWCR to domestic taxpayers; indeed, the U.S.-U.K. treaty was renegotiated in 1976 to make clear that it would not bar the States from applying the worldwide method to domestic corporations with British subsidiaries. Moreover, although the executive branch in 1982 and thereafter has opposed the application of WWCR to domestic taxpayers, that opposition has not been based on foreign relations concerns. California's application of WWCR to Colgate should be upheld even if Barclays prevails in its legal challenge, since Colgate's "equal treatment" argument is without merit.

4. Finally, if this Court concludes that the taxes at issue in these cases were unlawfully collected, it should make clear that in the unusual circumstances presented here, California is under no federal constitutional obligation to provide refunds. The taxes here were not inherently beyond California's power to levy; petitioners were not immune from income taxation in California, and they did not suffer unlawful discrimination vis-a-vis some other class of taxpayers. Rather, the gravamen of petitioners' claim is that California's use of WWCR during prior years impaired the federal government's ability to conduct foreign commercial policy. California's payment of money to the petitioners will not, of course, undo any disruption of federal government policy that may have already occurred, and in light of the recent modification of California's tax scheme, the executive branch has concluded that the provision of refunds for past years is unnecessary to protect the federal government's ability to speak with one voice in international trade.

ARGUMENT

1. This Court's opinion in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), sets forth the factors governing dormant Commerce Clause challenges to the States' regulation of domestic commerce. This Court has made clear, however, that "an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce." *Japan Line*, 441 U.S. at 451. In particular, a state taxing scheme may not constitutionally be applied to foreign commerce if it will "impair federal uniformity in an area where federal uniformity is essential, and prevent[] the Federal Government from speaking with one voice in international trade." *Container Corp.*, 463 U.S. at 193 (citation and internal quotations omitted).[10]

This more searching scrutiny is appropriate, in part, because "[f]oreign commerce is preeminently a matter of national concern." *Japan Line*, 441 U.S. at 448. In addition, however, this Court's approach reflects a recognition that in the sphere of foreign relations, federal officials are particularly likely to act by methods lacking legal formalities. That is, in the foreign sphere, federal policy is especially likely to take the form of informal agreements, understandings, long-term strategies, etc., that have not been codified in a statute or treaty. Cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting that President's power in the

[10] As an initial matter, the United States notes its disagreement with the California Supreme Court's reliance on this Court's decision in *Wardair Canada Inc.* v. *Florida Department of Revenue*, 477 U.S. 1 (1986). The most extensive congressional consideration of the States' use of WWCR—the 1977-1978 debate over ratification of the U.S.-U.K. Tax Convention—produced a substantial majority within the Senate in favor of Article 9(4). The Senate's final action on the treaty, in our view, should not be seen as affirmative permission for States to use the worldwide method; indeed, much of this Court's analysis in *Container Corp.* would have been unnecessary if Congress had already spoken.

field of international relations "does not require as a basis for its exercise an act of Congress").[11] The President's ability to deal with foreign governments in an effective manner would be seriously undermined if the accords he reaches could not be binding upon the States. Inquiry under the Commerce Clause is thus particularly searching where *foreign* commerce is concerned, because in this context it is particularly likely that a state law will disrupt federal *policy* even where it is preempted by no federal *law*.[12]

The difficulty, of course, lies in identifying those areas "where federal uniformity is essential." In the present dispute, it is quite clear that federal law has long embodied a *preference* for the arm's length method, in the sense that this method is used in computing the federal income tax liability of multinational corporations. This Court has recognized, however, that "[c]oncurrent federal

[11] Supersedure of state law by federal policies uncodified in any statute, treaty, or regulation is unusual, but it is not confined to the Foreign Commerce Clause. In *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), for example, this Court held that a state-law tort suit alleging negligent design could not lie against a contractor that had furnished military equipment to the government in compliance with precise contractual specifications. In areas of "uniquely federal interest," the Court recognized, state law would be displaced where "a significant conflict exists between an identifiable federal policy or interest and the operation of state law." 487 U.S. at 507 (brackets and internal quotations omitted).

[12] It is entirely clear, of course, that a federal statute or treaty prohibiting the States' use of WWCR would be a permissible exercise of federal power. In a certain sense it is thus at least potentially misleading to say that a State's method of taxation can ever "prevent" the federal government from speaking with one voice. See *Itel Containers Int'l Corp.* v. *Huddleston*, 113 S. Ct. 1095, 1108 (1993) (Scalia, J., concurring in part and concurring in the judgment). The danger, more precisely stated, is that a State's taxing scheme may prevent the federal government from implementing its policies *by methods other than statutes or treaties*. That danger is particularly acute in the realm of foreign relations, where important international understandings may for various reasons be less formalized.

and state taxation of income, of course, is a well-established norm. Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States." *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 448 (1980). Nor is it dispositive that the federal government has not embraced the WWCR method under its numerous bilateral agreements. This Court must look in addition to other factors to determine whether divergence between state and federal methods of taxation is tolerable in a particular sphere. We believe the Court's inquiry should be guided by the following principles:

a. This Court in *Container* observed that "[t]he most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole." 463 U.S. at 194. Accord, *Japan Line*, 441 U.S. at 450 (foreign "retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing state, so that the Nation as a whole would suffer"). The prospect of foreign retaliation serves to explain why a state tax may raise issues of national concern even when it is not imposed upon residents of other States. Threats of retaliation by foreign governments, however, cannot be sufficient *in themselves* to render a state tax invalid. Such a legal rule would in essence give foreign governments a "heckler's veto" over state taxing authorities. The rule would, moreover, encroach upon executive power by depriving the President of the authority to resist foreign demands when he considers resistance to be appropriate. Thus, in applying the "one voice" standard, foreign reaction cannot be dispositive in determining the propriety of a contested state tax.

The corollary to this proposition is that the political branches must be given primary responsibility for developing and articulating the foreign policy of the United States. As the Court observed in *Container Corp.*, "[t]his

Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please." 463 U.S. at 194. The second of these concerns is of particular importance. The factual question whether a particular state tax will precipitate foreign complaints, although far more expertly addressed by the political branches, is not wholly insusceptible of resolution through judicial proceedings. Questions concerning the federal government's proper response to such complaints, however, raise issues of foreign *policy* falling entirely outside the judicial ken.[13]

Thus, in applying the "one voice" test, the crucial question is whether the state action at issue is incompatible with federal policy as explicated by officials of the political branches.[14] We do not contend that executive branch personnel have the power to issue binding pronouncements declaring state taxing practices unconstitutional. In determining whether a state tax impairs the federal government's ability to speak with one voice, however, the Court must ascertain the contours of federal policies not codified in any statute or treaty; and in that process the statements of executive branch officials are entitled to substantial evidentiary weight.

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[13] "[M]atters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)). Cf. *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986).

[14] Similarly in *Boyle*, this Court did not attempt to determine by dint of its own expertise which state-law design requirements, if applied to military contractors, would impinge unduly upon the implementation of federal policy. Rather, the Court asked whether particular state-law requirements conflicted with contractual design specifications actually negotiated by federal procurement officials. See 487 U.S. at 509, 512.

The danger of improper encroachment on the President's conduct of foreign affairs, as noted above, is not limited to the situation where a State's method of taxation conflicts with an international understanding agreed to by the President or otherwise undermines the nation's international trade policies. Executive power is also improperly diminished when a court strikes down a state law on the basis of a foreign complaint that the President has determined to resist. Thus, in the absence of a dispositive statute or treaty, the courts must respect the judgments of the President regarding matters of foreign policy both where the President has determined that state compliance with an international norm is essential and where he has determined that foreign governments should not be allowed to dictate the practices of the States. The executive branch must be free in addition to adopt a middle ground: to acknowledge the validity of foreign concerns, and to attempt to persuade state officials to respond thereto, without insisting upon the States' immediate conformity with the federal norm. The courts therefore should not lightly infer a Foreign Commerce Clause violation from the mere fact that executive branch officials have attempted to persuade state authorities to alter their policies. Such an approach not only risks undue impairment of legitimate state prerogatives; it may also reduce presidential power by diminishing the executive's ability to employ "jawboning" and informal negotiation without invoking the specter of a constitutional confrontation.

b. In the past the Court has responded to these concerns partly by attaching special significance to the government's decision whether to file a brief amicus curiae in litigation brought by private taxpayers. See, *e.g.*, *Container Corp.*, 463 U.S. at 195-196; *Itel Containers*, 113 S. Ct. at 1105. The Court has thus treated amicus participation by the United States as significant evidence of the state tax's likely effect on the federal government's ability to conduct foreign policy. This pronounced reluctance to invalidate state laws as violative of the "one voice" principle in the absence of an amicus submission by the federal government has helped to ensure both that legitimate state taxing choices are not unnecessarily precluded and that the Court does not unwittingly subvert the President's conduct of foreign economic policy.

c. There are, however, difficulties—both theoretical and practical—with this approach. It is highly unusual that a legal brief should be given (in effect) evidentiary weight in the very case in which it is filed. It is unusual as well to permit the introduction of evidence at the appellate stage of legal proceedings. The most serious problem, however, arises in suits (such as this one) seeking refunds of taxes collected during prior years.[15] A brief filed by the government in 1994 provides a clear indication of current executive branch policy. It is not entitled to the same weight, however, in determining what policy was in place in 1977. Inordinate reliance on the government's current policy can therefore present the risk that States will be held liable for refunds of taxes that violated no federal policy, and were thus in no way unlawful, at the time of their collection.

Our prior briefs in this case were flawed, we now believe, not in their discussion of the generally applicable legal principles, but because they failed adequately to consider the state tax's consistency with federal policy during the particular tax years in question. These briefs cited no executive branch pronouncements antedating President Regan's Statement of November 8, 1985. In contending that the state tax was contrary to the federal government's foreign commercial policy, we argued in the California Supreme Court that "[t]he adoption by the Federal Executive of this policy is evidenced by the letter of January 30, 1986, from the Secretary of State for the United States to the Governor of California." 92-1384 Pet. App. H-31. Similarly, our brief amicus curiae in

[15] Because of the Tax Injunction Act, 28 U.S.C. 1341, a Commerce Clause challenge to a State's taxing scheme is far more likely to reach this Court in the context of a suit for refund than in any other posture. See *Alcan Aluminium*, 493 U.S. at 338-341.

this Court at a prior stage of this case asserted that the California tax "prevents the United States from speaking with one voice on this sensitive and important matter" (92-212 U.S. Amicus Br. at 12-13), but did not examine the contours of federal policy as it existed in 1977—the tax year at issue.

A focus on current federal policy would be appropriate in a suit for declaratory or injunctive relief against *continued* imposition of a contested state tax. We now believe, however, that proper analysis of Barclays' *refund* claim requires a focus on federal policy during the tax year in question. Throughout this litigation the government has argued that a state tax violates the Foreign Commerce Clause if it is incompatible with an international standard to which the United States has committed itself by general agreement with its trading partners. We adhere to that view, which was accepted by this Court in *Japan Line*. To establish a constitutional violation, however, petitioner must show that the incompatibility existed prior to the accrual of the disputed tax liability.

Recent developments in related areas of the law make a precise focus on the contested tax year particularly important. Just last Term, this Court made clear that its decisions in civil cases must be given retroactive effect. *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993). *Harper*, together with *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31, 39-41 (1990), also established that when a state tax is determined to have been unlawfully collected, the Constitution requires meaningful retrospective relief, ordinarily in the form of refunds. *Harper*, 113 S. Ct. at 2519-2520. These cases underscore the importance of a rigorous approach to the question whether a State tax was fatally inconsistent with federal foreign policy at the time the disputed tax liability accrued.

d. For the foregoing reasons, the Court's inquiry in the present case should focus on the federal government's foreign economic policy as it existed in 1977.[16] In our view, no federal policy precluding the States' application of WWCR existed at that time.[17]

As of 1977, federal officials had not indicated that further use by the States of WWCR would be incompatible with a standard to which the United States was committed by general agreement with its trading partners. Rather, the sole executive branch initiative to constrain the States' use of the worldwide method was its negotiation of Article 9(4) of the United States-United Kingdom Tax Convention. In defending that provision, Treasury Department officials asserted that the arm's length approach was the more accurate method of distinguishing domestic from foreign income. These officials also emphasized, however, that Article 9(4) should be judged not in isolation, but as part of a larger agreement offering substantial advantages to the United States. Perhaps most significantly, executive branch officials gave assurances that in the event of the treaty's approval by the Senate, States could continue to apply WWCR to corporations controlled by other (*i.e.*, non-U.K.) foreign

[16] This case does not present the question whether California's taxing scheme was fatally inconsistent with federal policy during any year subsequent to 1977, and the United States accordingly does not address that question, which, in our view, should ultimately be resolved in accordance with the legal standards set forth in this brief.

[17] We do not suggest, of course, that this case is governed by Commerce Clause *jurisprudence* as it existed in 1977. *Harper* makes clear that principles of law announced by this Court after 1977 apply to Barclays' claim for refunds. See 113 S. Ct. at 2517. This Court's task, however, is to apply these legal principles to the *facts* —including, where pertinent, the contours of executive branch policy—as they existed when the disputed tax liability accrued.

Similarly, in applying the "government contractor" defense recognized in *Boyle*, a court's focus must be on government procurement specifications as they existed when the product at issue was manufactured. See 487 U.S. at 512. A contractor that complied with existing specifications could not be held liable on a theory of improper design simply because federal procurement policy had changed by the time the suit was finally resolved.

nationals, and that their right to do so would not be bargained away except in return for concessions from our trading partners.

Against this backdrop, executive branch actions prior to and during the tax year in question cannot accurately be viewed as manifestations of a then-existing federal policy requiring uniformity among the States. As of 1977, the executive branch had expressed a preference for the arm's length method and had proposed the adoption of a legal bar on the States' application of WWCR to *British*-controlled corporations. Surrounding events make quite clear, however, that the United States had not at that time acceded to any general international understanding regarding the impropriety of the worldwide method. To the contrary, during the 1977-1978 debates, executive branch officials expressly affirmed that States would remain free to apply WWCR to other foreign-controlled corporations even if the treaty were approved. California's application of WWCR to foreign-controlled corporations in 1977 therefore did not impermissibly intrude upon the federal government's conduct of foreign relations.[18]

[18] Barclays also contends (92-1384 Pet. Br. 32-34) that California's application of WWCR to foreign-controlled multinationals creates a constitutionally impermissible risk of international double taxation. This Court held in *Container* that the risk of double taxation, though real, was not sufficiently grave to warrant invalidation of the WWCR method as applied to domestic corporations. 463 U.S. at 189-193. This Court reserved the question whether the tax could validly be applied to a foreign corporation, *id.* at 189 n.26, and noted that "[e]ven a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Id.* at 189 (quoting *Japan Line*, 441 U.S. at 456).

While the Court has sometimes appeared to treat double taxation and interference with federal foreign policy as separate dangers, see *Container Corp.*, 463 U.S. at 185-186, in fact in this context they are fundamentally intertwined. A level of double taxation that is constitutionally acceptable with respect to a domestic corporation could be deemed unacceptable with respect to a foreign taxpayer only on the ground that its application to foreign entities might trigger complaints or retaliation from other governments and hence disrupt our foreign commercial policy. Cf. *Japan Line*, 441 U.S. at 450-451. Since (as we demonstrate above) California's aplication of WWCR to foreign-controlled corporations in 1977 did not impermissibly intrude upon the federal government's conduct of foreign relations, Barclays' double taxation argument correspondingly fails.

3. Colgate-Palmolive Company, the petitioner in No. 92-1839, seeks refunds of taxes paid for the years 1970-1973. Colgate, a United States corporation, first argues that application of WWCR to domestic multinational corporations is impermissible because it impairs the federal government's ability to conduct foreign relations. Colgate contends that *Container Corp.* is not controlling because "[t]he missing evidence of the Executive Branch's opposition to worldwide combined reporting, which was crucial to the Court's decision in *Container*, has been supplied" (92-1839 Pet. Br. at 34) by subsequent executive branch pronouncements. In the alternative, Colgate contends that, even if application of WWCR to domestic corporations does not itself impair the conduct of foreign policy, a holding in Barclays' favor would require that the tax be invalidated as to domestic corporations as well, on the ground that application of different rules to domestic and foreign corporations "would seriously undermine the level playing field for different forms of protected commerce." *Id.* at 46. Colgate's claim should be rejected.

a. It is entirely clear that during the tax years in question there existed no federal policy against the States' application of WWCR to domestic corporations. Indeed, in 1976 the U.S.-U.K. Tax Convention was renegotiated in order to make clear that the treaty would *not* bar the States from applying WWCR to domestic corporations with British subsidiaries. As late as 1980, when the Treasury Department first expressed support for federal legislation barring the States from applying WWCR to foreign corporations, the Department noted that "[a]lthough the bill makes no distinction between corporate groups under

United States control and those under foreign control, such a distinction may be warranted." 92-1384 J.A. 588.[19] Application of WWCR to domestic corporations during the period at issue in this case therefore cannot be said to have "prevent[ed] the Federal Government from speaking with one voice in international trade." *Container Corp.*, 463 U.S. at 193 (citations and internal quotations omitted).[20]

b. As we have noted, see pp. 8, 11-12, the executive branch since 1982 has opposed the States' application of WWCR to domestic as well as foreign corporations. The executive has not asserted, however, that application of WWCR to domestic taxpayers interferes with the federal government's conduct of foreign relations. In submitting the Treasury Department's 1985 legislative proposal to Congress, Secretary Baker acknowledged that "the principal foreign commerce issues raised by state worldwide unitary taxation would be resolved if states were to agree that they would not impose worldwide unitary tax on foreign controlled entities." Baker letter at 2. The Secretary defended the scope of the proposed legislation (which would have barred the application of WWCR to both domestic and foreign taxpayers) not on foreign policy grounds, but as a means of preserving "competitive balance for domestic multinationals, foreign multinationals and purely domestic businesses in any resolution of the

[19] The Assistant Secretary of the Treasury for Tax Policy explained, in particular, that "the application of a unitary system to U.S. controlled corporate groups represents much less of an international irritant, if in fact that problem is present at all." 92-1384 J.A. 589.

[20] Colgate also argues that California's application of the unitary method violates a "clear federal directive" within the meaning of this Court's decision in *Container Corp.*, 92-1839 Pet. Br. at 34-36; see 463 U.S. at 194. This Court's analysis of the "clear federal directive" test in *Container Corp.* focused exclusively on pertinent *congressional* enactments, see *id.* at 196-197, and did not discuss executive branch pronouncements. In any event, Colgate has identified no pertinent executive branch pronouncement issued prior to or during 1970-1973, the tax years in question.

unitary issue." *Ibid.* Since that time the executive branch has continued to express the view that "[a]s a tax policy matter, we are equally opposed to the use of worldwide unitary apportionment to determine the income of domestic-parent multinational corporations and that of foreign-parent multinational corporations." 92-1839 J.A 35. The executive has not, however, asserted that application of WWCR to domestic corporations will impair the government's conduct of foreign relations, nor has the government participated in support of Colgate's constitutional claim at any stage of this litigation. Colgate therefore has wholly failed to show that California's application of the worldwide method to domestic taxpayers has "prevent[ed] the Federal Government from speaking with one voice in international trade." *Container Corp.*, 463 U.S. at 193 (citations and internal quotations omitted).

c. Finally, we believe that California's application of WWCR to Colgate should be upheld even if Barclays prevails in its legal challenge, since Colgate's "equal treatment" argument is without merit. The executive branch, we acknowledge, has previously expressed the view that divergent treatment of foreign and domestic taxpayers is undesirable as a matter of tax policy. Colgate cites no authority, however, holding that discrimination in favor of foreign taxpayers raises *constitutional* concerns under the Foreign Commerce Clause. The difference in treatment would be rationally justified by a finding that application of WWCR to foreign corporations has impaired the federal government's conduct of foreign economic policy and engendered frequent complaints by foreign nations, while application of this accounting method to domestic taxpayers has had neither of these consequences.[21]

[21] Taken to its logical conclusion, Colgate's argument implies that whenever a domestic taxpayer raises a Commerce Clause challenge to a state tax law, the reviewing court must determine whether that law could permissibly be applied to a foreign taxpayer, and must strike it down on "equal treatment" grounds if its application in the foreign context would be improper. That cannot be the law. Indeed, the whole point of *Japan Line* is that taxing practices that

4. For the foregoing reasons, we believe that the taxes at issue in these cases violated no federal policy and therefore were not unlawfully collected. If the Court holds otherwise, however, we believe it should make clear that in the unusual circumstances presented here—specifically, the recent modification of the State's taxing scheme—California is under no federal constitutional obligation to provide refunds.[22]

When a state tax is determined to have been unlawfully collected, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson*, 496 U.S. at 31 (footnotes omitted). Accord *Harper*, 113 S. Ct. at 2519. Under some circumstances—as, for example, where the tax "was beyond the State's power to impose," *McKesson*, 496 U.S. at 39, or where "the taxpayers were absolutely immune from the tax," *ibid.*—the required remedy is a refund of taxes previously collected. In other situations, however,

are permissible with respect to domestic commerce are sometimes unlawful as applied to foreign commerce and/or foreign taxpayers.

[22] The supplemental brief filed by Barclays at the petition stage asserts that the United States, in its brief amicus curiae filed in October 1993, "completely omits any reference to the other six states that use worldwide combined reporting." 92-1384 Supp. Pet. Br. at 7. Although this statement was unsupported by statutory citations, petitioner's counsel of record has indicated that Alaska, Idaho, Montana, North Dakota, Tennessee, and Utah are the six States at issue. However, none of these States uses a WWCR system like the California system at issue here. In Utah, for example, WWCR is entirely elective for taxpayers. Utah Code Ann. §§ 59-7-304(3) (repealed effective 1/1/94) and 59-7-403 (effective 1/1/94) (1992 & Supp. 1993). Idaho, Montana, and North Dakota allow taxpayers to elect "water's edge" treatment in lieu of WWCR. Idaho Code 63-3027B (1989 & Supp. 1993); Montana Code Ann. §§ 15-31-322 to 15-31-326 (1993); North Dakota Century Code ch. 57-38.4-02 (1993). Alaska and Tennessee require WWCR only for certain sectors (oil and gas and financial institutions, respectively), Alaska Stat. § 43.20.073 (1990 & Supp. 1992) and Tennessee Code Ann. § 67-4-812(c)(1)(B) (1989 & Supp. 1993), and we are not aware of any objections expressed by the affected taxpayers.

the State "retains flexibility" to devise alternative adjustments that will cure the illegality, even if those adjustments do not involve the payment of money to the plaintiff taxpayer. *Ibid.*; *Harper*, 113 S. Ct. at 2519. Thus, where a state tax is found to have discriminated impermissibly against interstate commerce, "the State may assess and collect back taxes from [the taxpayer's] competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." *McKesson*, 496 U.S. at 40.

In the present case, the tax at issue was not beyond the State's power to impose; it utilized a constitutionally fair method of apportioning income under this Court's decision in *Container Corp.* The petitioners were not immune from income taxation in California. Nor have petitioners suffered unlawful discrimination vis-a-vis some other class of taxpayers. Rather, the gravamen of petitioners' claim is that California's use of WWCR during prior years impaired the federal government's ability to conduct foreign commercial policy.

California's payment of money to the petitioners will not, of course, undo any disruption of federal government policy that may have already occurred. This is consequently a rare situation in which the provision of "meaningful backward-looking relief" is infeasible because the alleged constitutional injury—the impairment of the federal government's ability to conduct the nation's foreign policy—simply is not remediable by judicial order. A monetary remedy might nonetheless be appropriate if it appeared likely that the State's failure to provide refunds would itself become a subject of international contention or inspire reprisals from foreign governments. In light of the recent modification of California's tax scheme, however, the executive branch has concluded that the provision of refunds for past years is unnecessary to protect the federal government's present or future ability to speak in the future with one voice in international trade—*i.e.*, that California's prospective change suffices to eliminate

the basis for invalidating the taxes at issue. Indeed, the United Kingdom has deferred the implementation of retaliatory measures and has indicated that it will retaliate "only if it is found that the [1993 California] legislation is being applied in a way which exposes UK owned companies to damage from taxation that is inconsistent with the arm's length principle." 92-1384 Supp. Pet. Br. App. A-36. In these unusual circumstances, we believe that the Constitution imposes upon California no duty to provide a retrospective monetary remedy to corporate entities whose taxes were previously calculated on the basis of the worldwide method.

CONCLUSION

With respect to the questions discussed in this brief, the judgments of the court of appeal should be affirmed.

Respectfully submitted.

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